No. 04-81

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENT FARMERS' SUPPLEMENTAL BRIEF ADDRESSING PETITIONER BASF'S AMICUS BRIEF IN *BATES V. DOW AGROSCIENCES* (NO. 03-388) IMPROPERLY ARGUING MERITS OF PETITION FOR A WRIT IN *BASF V. PETERSON* (NO. 04-81) WITHOUT NOTIFYING FARMERS' COUNSEL AND INCREDULOUSLY COMPLAINING THAT *PETERSON* JURY'S "FRAUDULENT MARKETING" VERDICT REQUIRES BASF TO CHANGE PRODUCT LABELS

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I. SUMMARY ARGUMENT

Respondents (Farmers) submit this supplemental brief in *BASF Corporation v. Ronald Peterson, et al.* (No. 04-81) (*Peterson*), pursuant to Sup. Ct. R. 18.10, in opposition to Petitioner BASF Corporation's (BASF) November 24, 2004 amicus submission in *Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388) (*Bates*). BASF's *Bates* submission is an "intervening matter" under Rule 18.10 meriting this supplemental brief by Farmers in advance of January 10, 2004 oral argument in *Bates*.

BASF's *Bates* brief egregiously misstates the facts and legal issues in BASF's pending petition for a writ of certiorari in *Peterson*, submitted for October 29, 2004 bench conference, without notice and service of a copy of the *Bates* brief on Farmers' counsel. BASF's effete effort to utilize *Bates* to gain an unfair tactical advantage in *Peterson* should not be countenanced.

The *Peterson* jury verdict does not prohibit companies like BASF from container-labeling a product for fewer crops than registered by the EPA, or naming one product as different products for sale. However, the jury verdict and unanimous Minnesota appellate rulings unequivocally recognize that a company cannot exploit a federal health and safety process to market one product "***for different uses at different prices through a 'system of deceit.'***" *Peterson v. BASF Corp.*, 657 N.W.2d 853, 860 (Minn. App. 2003) (*Peterson II*) (emphasis added). In short, fraudulent marketing schemes intended to exact higher prices from segments of the unknowing consumer market are never preempted by federal health and safety law. *Peterson v. BASF Corp.*, 675 N.W.2d 57, 62 (Minn. 2004) (*Peterson III*) ("Evidence was presented at trial that BASF's strategy was to segment the market for the products between major and minor crops . . . $4 per acre" price differential).

Farmers ask this Court to promptly deny BASF's petition as frivolous. The EPA, by its own edict in this case, does not regulate fraudulent marketing – a "***company marketing decision in which EPA has no***

input." *Peterson III*, 675 N.W.2d at 70-71 (emphasis added); PX334 (***"it is related to a marketing strategy and is not a regulatory matter."***) (emphasis added). And during trial, BASF's regulatory and marketing experts and management conceded that BASF's compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), has no relation to consumer fraud.

II. BASF IMPROPERLY FILES AMICUS BRIEF IN *BATES* ARGUING MERITS OF PETITION FOR A WRIT IN *PETERSON* WITHOUT SERVING FARMERS' COUNSEL

Before this Court is BASF's petition for a writ of certiorari asking this Court to review three unanimous published Minnesota appellate rulings and a unanimous 12-member jury verdict approving Farmers' claims that BASF engaged in a national "system of deceit" in the marketing of its Poast and Poast Plus herbicide. *See Peterson* (No. 04-81), Respondents' Brief In Opposition, September 24, 2004. Also before this Court, for oral argument on January 10, 2004, is *Bates* (No. 03-388) (whether FIFRA preempts claims of peanut crop damage caused by pesticide).

On November 24, 2004, BASF filed an amicus brief in *Bates*. ***Without serving notice and a copy of its Bates amicus filing on Peterson counsel***, BASF complains in its *Bates* amicus: "The Court's decision in [*Bates*] may substantially affect BASF's pending [*Peterson* petition]."

Farmers learned of BASF's *Bates* amicus filing on December 16, 2004, weeks after the filing. BASF's use of *Bates* to gain an unfair tactical advantage in *Peterson* – replete with egregious misrepresentation of the *Peterson* factual and legal record – should be rejected. *See, e.g.*, Minn.R.Professional Conduct 3.5(g)(2) (lawyer must provide notice to opposing counsel of any effort to communicate merits of argument with judge in pending proceeding).

III. BASF INCREDULOUSLY COMPLAINS IN ITS *BATES* BRIEF THAT *PETERSON* JURY'S UNANIMOUS "MARKETING" FRAUD VERDICT FOR FARMERS REQUIRES BASF TO CHANGE PRODUCT LABELS

A. BASF Ignores Jury Verdict And Established Evidence Of BASF's "System Of Deceit"

BASF's *Bates* filing wholly ignores the *Peterson* jury's special verdict findings and compelling evidence of BASF's "system of deceit" to exploit minor crop farmers. Under the guise of a frivolous federal preemption complaint, BASF never confronts the extensive evidence of BASF's fraudulent misrepresentations and concealment, affirmed by a unanimous Minnesota Supreme Court:

> [F]armers argue that their consumer fraud claim is not based on BASF's labels but rather on ***fraudulent marketing techniques.*** The court of appeals agreed. It held that "the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II,* 657 N.W.2d at 865. Further, the court of appeals noted that "the farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if BASF's* labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops . . .
>
> For example, the farmers presented evidence that BASF advertised Poast Plus as only "registered" for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the "only" post-emergent grass herbicide registered for use on minor crops, ***which a BASF executive candidly admitted was a material omission.*** Additionally, BASF attempted to prevent word from spreading that Poast Plus was registered for use on minor

> crops. A BASF sales representative informed authorities that farmers were using Poast Plus on minor crops, BASF had its public relations firm submit a magazine article discussing increased enforcement of fines for failing to follow label recommendations, and BASF told the North Dakota Department of Agriculture that BASF could not add crops on the Poast label to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. BASF's alleged unconscionable conduct went beyond the label and the reach of federal law. As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the ***"problem appears to stem from a company marketing decision in which the EPA had no input."***

Peterson III, 675 N.W.2d at 70 (emphasis added).

Testified Farmers' FIFRA expert, Dr. Charles Benbrook: "It was, for approximately a five-, six-year period, price gouging." Tr.1939:17. North Dakota Agriculture Commissioner Sarah Vogel and Jack Peterson, head of pesticide enforcement for North Dakota, bluntly and repeatedly testified that BASF had lied to them: ***"[I] can take hard answers, but don't lie. Just – you don't lie."*** Tr.1878:5-6;1559:16-251;1566:17-25;1567:1;1681:17-25;1682:1-3.
BASF's management conceded that BASF's marketing for Poast/Poast Plus was misleading:

> A. (BASF's Chris Coombs) (reading from BASF marketing materials) Okay. Poast Plus is registered for use on the following crops only. Cotton, soybeans, peanuts and alfalfa.
>
> Q. ***Stop there. Do you consider it to be a material omission to say that Poast Plus is registered for use on the following crops only, cotton, soybeans, peanuts and alfalfa, when you knew that it was registered on all of the same crops as Poast?***
>
> A. ***Yes, I would consider that.***

Tr.3588:15-24.

BASF ignores the compelling and established record evidence and extensive review by the Minnesota appellate courts. And BASF disingenuously complains in its stealth *Bates* filing that the *Peterson* jury verdict attacks the pesticide label. This case was tried to a 12-member jury for five-weeks in November and December, 2001, with a unanimous jury finding that BASF engaged in "deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies***" and a "knowing omission, suppression or concealment of the truth" as part of its marketing scheme. Clerk Doc. 575 (December 6, 2001 Special Verdict); *Peterson III*, 675 N.W.2d at 63-64 ("BASF made material misrepresentations in advertisements . . . [and engaged in many other] . . . efforts to prevent farmers from learning that Poast Plus was [EPA] approved for use on the same crops as Poast."); *Peterson II*, 657 N.W.2d at 866 ("jury could conclude that BASF's marketing scheme . . . concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA"); *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *rev. denied* (Minn. Jan. 26, 2001) (*Peterson I*) (remanding for a jury to determine whether BASF's herbicide marketing and pricing schemes deceived farmers as a "system of deceit" to exact inflated prices from minor crop farmers).

B. BASF Ignores EPA's Pronouncement That BASF's "Marketing" Scheme Was Not Preempted

Farmers' "fraudulent marketing" case in *Peterson* has nothing to do with FIFRA preemption disputes involving injury to people and crops. The Minnesota Supreme Court in *Peterson III* acknowledged the EPA's edict that the EPA does not regulate company "marketing" of a herbicide – "***a company marketing decision in which the EPA had no input***." 675 N.W.2d at 70 (emphasis added); PX82.[1] There is

[1] As recognized in *Peterson I*, 618 N.W.2d at 824, the EPA permits a company to register an approved set of uses for a single active pesticide ingredient but container label the product sold to consumers for only some and not all of the registered uses. 40 C.F.R. §§ 152.113 and 152.130(b)

(Continued on following page)

absolutely no authority, much less a split in authority, supporting BASF's disregard of the EPA's own statements in this case, or its claim that Farmers' "fraudulent marketing" claims are preempted by FIFRA.

C. BASF Management Knew That EPA Did Not Oversee Its Marketing Practices

A confidential internal BASF memorandum circulated to BASF management states that the EPA was upset that BASF had deceived state regulators in perpetrating its Poast/Poast Plus marketing fraud: "Mr. Taylor [of EPA] told me he did not appreciate getting put in the middle of this issue since ***it is related to a marketing strategy and is not a regulatory matter***." PX334 (emphasis added).

D. BASF's Regulatory And Marketing Experts And Management Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud

Farmers' fraud claims were based on BASF's "marketing scheme" and were not based on "technically accurate" product labels. *Peterson II*, 657 N.W.2d at 865. During trial, BASF's regulatory and marketing experts and management conceded that the EPA and state herbicide regulatory process has no relation to whether a company deceptively and fraudulently markets and sells a product:

BASF's regulatory expert – Daniel Barolo

Q. And the same thing would be true of ***a company who went through all the process of registering a crop with both the EPA and***

("split and subset labeling"). The EPA also allows companies to register alternate brand names for a registered product. FIFRA § 3(e). The EPA does not ascertain the reasons why companies choose to split or subset label their pesticides, beyond a demonstration that a split or subset label "*would not significantly increase the risk of any unreasonable adverse effect on the environment.*" 40 C.F.R. § 152.113(b) (emphasis added). Simply stated, the ***EPA does not address company marketing and pricing practices.***

states, they could still commit consumer fraud.

A. ***I presume they could.***

Tr.2697:7-11.

BASF's marketing expert – Dr. Dale Dahl

Q. Okay. ***So patents, consumer fraud, doesn't cover it. Registration, consumer fraud doesn't cover it. Differential pricing, consumer fraud doesn't cover it. In other words, you're not protected from committing consumer fraud.***

A. ***Right.***

Tr.3352:12-17.

BASF's management – William Wisdom

Q. And ***you will agree and tell the jury that the EPA does not concern itself with BASF's marketing practices, does it?***

A. ***That's correct.***

Q. ***But consumer fraud laws do, don't they?***

A. ***Yes, sir.***

Q. ***The EPA registration process that we have been talking about does not concern market[ing]; right?***

A. ***That's correct.***

Tr.1017:7-15.

E. FIFRA Preemption In A Nutshell

1. *Peterson* – A "Fraudulent Marketing" Case – Has Nothing To Do With FIFRA Preemption Disputes Involving Injury To People And Crops

Farmers have never challenged the adequacy of the safety warnings on the Poast and Poast Plus herbicide product labels (failure-to-warn), phytotoxicity of the product (whether it harms the crop), or efficacy of the product (whether it works as intended). Nor do Farmers

claim that BASF misled the EPA. Farmers challenge the deceptive marketing of the products to consumers. BASF misuses cases that have no relationship to Farmers' fraudulent marketing claims:

Failure-To-Warn Cases

- *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied*, 537 U.S. 949 (2002) (*injury* to horse rider caused by use of insecticide on horse);
- *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (*injury* to workers caused by pesticide);

Phytotoxicity Cases

- *Dow Agrosciences LLC v. Bates*, 332 F.3d 323 (5th Cir. 2003), *cert. granted*, 2004 WL 1431958 (U.S. June 28, 2004) (No. 03-388) (*injury* to peanut crop caused by herbicide);
- *Etcheverry v. Tri-Ag Serv., Inc.*, 93 Cal. Rptr. 2d 36 (Cal. 2000) (*injury* to walnut crop caused by insecticide);
- *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (*injury* to cotton crop caused by herbicide);

Fraud On EPA Cases

- *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (fraud by company in registration submissions to EPA).

BASF's misuse of cases was easily addressed by the Minnesota appellate courts. *Peterson III*, 675 N.W.2d at 70 (consumer fraud claims based on "fraudulent marketing techniques" rather than label representations are not preempted); *Peterson II*, 657 N.W.2d at 865 (emphasis in original) ("*even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud").

2. Although Courts Debate Whether *Failure-To-Warn* And *Phytotoxicity* Cases Are Preempted, Informed Courts Agree *Efficacy* Cases Are Not Preempted, And All Courts Agree That State Consumer Fraud Claims Of *Deceptive Marketing Schemes* Are Never Preempted

a. Failure-To-Warn; *Unintended Safety Consequences* For People And Environment Evaluated By EPA – Maybe Preempted

Courts generally hold that that "failure to warn" product liability cases for unintended safety consequences are preempted by FIFRA – a health and safety law governing pesticide application and registration decisions as they relate to the health and safety of the pesticide for the environment. *See, e.g., Etcheverry v. TRI-AG Service, Inc.*, 993 P.2d 366 (Cal. 2000) (failure-to-warn and phytotoxicity claims preempted; efficacy claims not preempted); *Hart v. Bayer Corp.*, 199 F.3d 239, 245-46 (5th Cir. 2000) (efficacy claims not preempted).

b. Phytotoxicity; *Company Certifies Safety For Intended Use* In EPA Registration Submission – Maybe Not Preempted

A more vexing question is whether phytotoxicity cases, like *Bates*, should be preempted. Should farmers be barred from suing a profiteering company that sells a product that harms the crop – an intended use certified by the company to the EPA as safe? *See* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption Of State Tort Remedies*, 77 B.U.L.Rev. 559, 561 (1997) (corporations should not be allowed to turn statutes from regulatory swords into private shields).

c. Efficacy; *Product Does Not Work* – Not Preempted

Courts virtually all agree that efficacy cases should not be preempted. *See, e.g., Etcheverry*, 993 P.2d 366 (Cal. 2000)

(efficacy claims not preempted); *Hart*, 199 F.3d at 245-46 (efficacy claims not preempted). A company should not be immunized by a federal health and safety law against claims that its product does not work, e.g., a herbicide that ***does not kill target weeds***.

d. *Fraudulent Marketing Schemes* – Absolutely Never Preempted

All courts agree that "fraudulent marketing" claims like *Peterson* – which fully implicate the historic police power of the State to protect innocent consumers from fraud – should never be preempted. *See, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991) (FIFRA is not intended to usurp the historic police powers of the State).

3. Jury Verdict Does Not Require BASF To Change Product Labels – Jury Verdict Only Tells BASF To Stop Fraudulent Marketing Schemes

Farmers have never challenged the accuracy or adequacy of the Poast and Poast Plus product labels. *Peterson III*, 675 N.W.2d at 70 (emphasis in original and added), citing *Peterson II*, 657 N.W.2d at 865 (Farmers' claims are "***not based on BASF's labels but rather on fraudulent marketing techniques***."). The jury verdict does not prohibit companies like BASF from container-labeling a product for fewer crops than registered by the EPA, or branding (naming) one product as different products for sale. It only requires companies like BASF to be honest in their communications to consumers.

IV. CONCLUSION

The EPA declared that BASF's fraudulent "marketing" scheme was not in the EPA's purview and not preempted. The Minnesota appellate courts and common sense declare likewise. Farmers ask this Court to promptly deny BASF's frivolous petition.

Respectfully submitted,

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